PP v. YUSOF SARUAN

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
HARMINDAR SINGH DHALIWAL JCA
STEPHEN CHUNG JCA
[CRIMINAL APPEAL NO: M-05(SH)-436-09-2017]
9 MAY 2019

CRIMINAL PROCEDURE: *Appeal – Appeal by prosecution – Accused person initially charged with murder under s. 302 of Penal Code – Accused person stabbed deceased multiple times before stealing deceased's valuables – Charge amended to culpable homicide not amounting to murder under s. 304(a) of Penal Code – Whether there was intention to kill – Whether nature and severity of injuries to deceased's vital organs showed accused person's intention*

CRIMINAL LAW: *Penal Code – Section 302 – Offence of murder – Accused person initially charged with murder under s. 302 of Penal Code – Accused person stabbed deceased multiple times before stealing deceased's valuables – Charge amended to culpable homicide not amounting to murder under s. 304(a) of Penal Code – Whether there was intention to kill – Whether nature and severity of injuries to deceased's vital organs showed accused person's intention – Whether there was grave and sudden provocation – Whether conduct of accused person, prior to and after incident, supported defence of grave and sudden provocation and lack of intention*

EVIDENCE: *Witness – Demeanour – Accused person initially charged with murder under s. 302 of Penal Code – Accused person stabbed deceased multiple times before stealing deceased's valuables – Charge amended to culpable homicide not amounting to murder under s. 304(a) of Penal Code – Trial judge found accused person guilty of amended charge – Accused person calm in answering questions during cross-examination – Whether demeanour in courtroom reliable guide to credibility*

The respondent had taken drugs before he received a call from the deceased, requesting for a meet up. When the respondent arrived, a quarrel took place between him and the deceased, after the deceased uttered the words 'susah berurusan dengan orang Melayu dan juga Melayu bangsat'. This angered the respondent, causing him to stab the deceased using a knife retrieved from the basket of his motorcycle. The respondent then fled the scene but not before taking the deceased's valuables. The respondent was charged with murder, an offence under s. 302 of the Penal Code ('PC') ('original charge'). However, at the conclusion of the prosecution's case, the Judicial Commissioner ('JC') amended the charge to one of culpable homicide not amounting to murder under s. 304(a) of the PC ('amended charge'). The respondent pleaded guilty to the amended charge and was sentenced to 25 years imprisonment. Upon appeal by the prosecution to the Court of Appeal, which was allowed, the respondent was ordered to enter his defence on the original charge at the High Court. Again, the JC found the respondent guilty

of the amended charge and he was sentenced to 25 years imprisonment. In arriving at the said decision, the JC considered: (i) the inflammatory words used by the deceased caused the respondent to lose his mind; (ii) the respondent's defence of grave and sudden provocation; (iii) the fact that the respondent was under the influence of drugs and could not control himself from stabbing the deceased; and (iv) the respondent's calm demeanour in answering questions during cross-examination. Hence, the present appeal by the prosecution. In support of the appeal, the prosecution argued that the JC did not sufficiently consider: (i) the evidence relating to the intention to kill as the JC did not take into account the nature and severity of the injuries to the deceased's vital organs; and (ii) the conduct of the respondent, prior to and after the incident, negated any defence of grave and sudden provocation and lack of intention.

Held (allowing appeal)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The JC was in error in failing to consider various compelling evidence adduced by the prosecution. Firstly, there was the evidence of the post-mortem report on the deceased and the testimony of the pathologist. Taking into account the multiple stab wounds inflicted on vital organs in the body, there could be little doubt that there was, at least, the intention to cause such bodily injury which was sufficient, in the ordinary course of nature, to cause death. In fact, the bodily injury caused was such that the respondent knew would cause the death of the deceased. The intention under elements (b) and (c) of s. 300 of the PC was proved. The conduct of the respondent, on the day of the incident, further bore out his intention to inflict those injuries. He had brought a knife with him. There was some discrepancy as to whether the knife was always in the basket of the motorcycle or whether he had specifically taken the knife from his house. Giving the respondent the benefit of any doubt, there was no reason for him to have the knife in his hand when the argument took place between him and the deceased. (paras 16, 18 & 19)

(2) After stabbing the deceased multiple times, the respondent had also taken the valuables of the deceased, namely his wallet, gold chain and a mobile phone. The gold chain was later pawned for money. After taking the wallet from the deceased, the respondent threw away the identity card and driving licence and kept the money in it. This was all conduct under s. 8 of the Evidence Act 1950 to establish motive and preparation for the crime. (para 20)

(3) In order to set up provocation as a defence to reduce the offence of murder to one of culpable homicide, it is necessary to show such grave and sudden provocation as would cause any reasonable person to lose his/her self-control, as provided by exception 1 to s. 300 of the Penal Code. A mere statement by an accused, that he lost his self-control, is

insufficient. The test of gravity is an objection one. The test is: would such provocation cause a reasonable man to lose his self-control. The JC was in error in holding that grave and sudden provocation had been established. The action of the respondent was certainly out of proportion to the gravity of the provocation. The nature of the provocation was, at most, mere verbal abuse. Such provocation would not be met by any reasonable person with multiple stab wounds to vital organs of the body. The actions of the respondent must fail the 'grave and sudden' requirement of provocation. The response of the respondent to mere verbal abuse, and that too, by an unarmed man, showed that he was a callous man with a total disregard of human life. (paras 21, 23 & 25)

(4) The demeanour of the respondent was not sufficient to override the overwhelming and uncontroverted evidence against him. Demeanour in the courtroom is not always a reliable guide to credibility. A consummate liar may be completely calm and unruffled by any stress during cross-examination. There is usually some delay between arrest and trial. Hence, there is plenty of time to prepare and rehearse answers to possible questions. On the other hand, an honest but anxious witness terrified of being disbelieved would be nervous when giving answers thus projecting a shaky demeanour. A judge in a courtroom is in no position to place complete faith in demeanour as a guide to honesty. It would be better to determine the truthfulness of a witness by a critical examination of his testimony with the whole of the evidence adduced at the trial. His testimony may be consistent or inconsistent with the established facts and circumstances or may be corroborated by other evidence at the trial. Certainly, demeanour should be the least weighty element in determining credibility. (paras 28-31)

(5) There were merits in the appeal. The decision of the High Court was against the weight of evidence. A conviction for the original charge was warranted. Accordingly, the conviction and sentence for culpable homicide not amounting to murder was set aside and substituted with a conviction for murder under s. 302 of the PC. The respondent was sentenced to death. (para 32)

Bahasa Malaysia *Headnotes*

Responden telah mengambil dadah sebelum dia menerima satu panggilan daripada si mati, yang meminta agar mereka berjumpa. Setibanya responden, satu perkelahian berlaku antara dia dan si mati selepas si mati mengungkapkan kata-kata 'susah berurusan dengan orang Melayu dan juga Melayu bangsat'. Ini membangkitkan kemarahan responden dan menyebabkan dia menikam si mati menggunakan sebilah pisau yang diambil dari bakul motosikalnya. Responden kemudian lari dari tempat kejadian tetapi sempat mengambil barang berharga si mati. Responden dituduh membunuh, satu kesalahan bawah s. 302 Kanun Keseksaan ('KK')

A ('pertuduhan asal'). Walau bagaimanapun, pada penutup kes pendakwaan, Pesuruhjaya Kehakiman ('PK') meminda pertuduhan menjadi homisid salah yang tidak terjumlah sebagai membunuh bawah s. 304(a) KK ('pertuduhan terpinda'). Responden mengaku bersalah bawah pertuduhan terpinda dan dijatuhkan hukuman penjara 25 tahun. Berikutan rayuan oleh pihak
B pendakwaan di Mahkamah Rayuan, yang dibenarkan, responden diperintahkan membela diri terhadap pertuduhan asal di Mahkamah Tinggi. Sekali lagi, PK mendapati responden bersalah atas pertuduhan terpinda dan dijatuhkan hukuman penjara 25 tahun. Dalam mencapai keputusan tersebut, PK mempertimbangkan (i) kata-kata berapi si mati yang menyebabkan
C responden hilang fikiran; (ii) pembelaan responden iaitu provokasi keterlaluan dan tiba-tiba; (iii) fakta bahawa responden bawah pengaruh dadah dan gagal mengawal dirinya daripada menikam si mati; dan (iv) tingkah laku responden yang tenang dalam menjawab soalan ketika pemeriksaan balas. Maka timbul rayuan ini oleh pihak pendakwaan. Menyokong rayuan, pihak pendakwaan menghujahkan PK tidak mempertimbangkan secukupnya:
D (i) keterangan berkenaan niat membunuh kerana PK tidak mengambil kira sifat dan keparahan kecederaan organ-organ penting si mati; dan (ii) tindakan responden, sebelum dan selepas insiden, yang menidakkan apa-apa pembelaan provokasi keterlaluan dan tiba-tiba dan ketiadaan niat.

E **Diputuskan (membenarkan rayuan)**
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Pesuruhjaya Kehakiman terkhilaf kerana gagal mempertimbangkan pelbagai keterangan kuat yang dikemukakan oleh pihak pendakwaan.
F Pertama, terdapat keterangan laporan bedah siasat si mati dan keterangan ahli patologi. Mengambil kira beberapa luka tikaman pada organ-organ penting badan, tidak diragui terdapat, paling tidak, niat menyebabkan kecederaan pada badan yang, secara semulajadi, cukup untuk menyebabkan kematian. Malah, responden tahu kecederaan yang
G dikenakan akan menyebabkan kematian si mati. Niat bawah elemen (b) dan (c) s. 300 KK terbukti. Tindakan responden pada hari kejadian seterusnya menunjukkan niatnya mengenakan kecederaan tersebut. Dia membawa sebilah pisau bersama-samanya. Terdapat percanggahan sama ada pisau tersebut sentiasa berada di dalam bakul motosikalnya atau sama ada dia, secara khusus, mengambil pisau tersebut dari rumahnya.
H Memberi manfaat keraguan kepada responden, tiada alasan untuk dia membawa pisau tersebut di dalam tangannya ketika perkelahian berlaku antara dia dan si mati.

(2) Selepas beberapa kali menikam si mati, responden juga mengambil
I barangan berharga milik si mati, iaitu dompet, rantai emas dan telefon bimbitnya. Rantai emas tersebut kemudian dipajak demi wang. Selepas mengambil dompet si mati, responden mencampakkan kad pengenalan

dan lesen memandu si mati dan menyimpan wang yang ada di dalamnya. Ini semua adalah kelakuan bawah s. 8 Akta Keterangan 1950 untuk membuktikan motif dan persediaan melakukan jenayah.

(3) Dalam membangkitkan provokasi sebagai pembelaan untuk mengurangkan kesalahan membunuh agar menjadi homisid salah, perlu untuk menunjukkan provokasi keterlaluan dan tiba-tiba tersebut akan menyebabkan mana-mana orang munasabah hilang kawalan diri, seperti yang diperuntukkan bawah pengecualian 1 s. 300 Kanun Keseksaan. Pernyataan semata-mata oleh seorang tertuduh, bahawa dia hilang kawalan diri, tidak cukup. Ujian keterlaluan bersifat objektif. Ujiannya ialah: adakah provokasi sedemikian akan menyebabkan seorang yang munasabah hilang kawalan dirinya. Pesuruhjaya Kehakiman terkhilaf dalam memutuskan provokasi keterlaluan dan tiba-tiba berjaya dibuktikan. Tindakan responden sudah tentu tidak seimbang dengan keterlaluan provokasi. Sifat provokasi, paling tidak, sekadar serangan lisan. Provokasi sedemikian tidak akan dibalas, oleh mana-mana orang munasabah, dengan beberapa luka tikaman pada organ-organ penting badan. Tindakan responden semestinya gagal keperluan 'keterlaluan dan tiba-tiba' provokasi. Respon responden terhadap serangan lisan, oleh lelaki yang tidak bersenjata, menunjukkan dia seorang yang tidak berhati perut dan sama sekali tidak mempedulikan nyawa manusia.

(4) Tingkah laku responden tidak cukup untuk mengatasi keterangan yang banyak dan tidak boleh disangkal terhadapnya. Tingkah laku di dalam mahkamah bukanlah sentiasa panduan yang boleh dipercayai semasa pemeriksaan balas. Lazimnya, terdapat kelengahan antara masa penahanan dan perbicaraan. Oleh itu, banyak masa untuk membuat persediaan dan berlatih memberi jawapan pada soalan-soalan yang mungkin diajukan. Sebaliknya, seorang saksi yang jujur tetapi cemas kerana khuatir tidak dipercayai akan menggeletar. Seorang hakim di dalam mahkamah tidak patut meletakkan kepercayaan penuh pada tingkah laku sebagai panduan kejujuran. Lebih baik menentukan kejujuran saksi melalui pemeriksaan kritikal keterangannya dengan keseluruhan keterangan yang dikemukakan semasa perbicaraan. Keterangannya mungkin selaras atau tidak selaras dengan fakta dan hal-hal keadaan yang terbukti atau boleh disokong oleh mana-mana keterangan semasa perbicaraan. Tingkah laku, sudah tentu, elemen yang paling tidak penting dalam menentukan kebolehpercayaan.

(5) Rayuan bermerit. Keputusan Mahkamah Tinggi tidak selari dengan berat keterangan. Sabitan terhadap pertuduhan asal adalah wajar. Berikutan itu, sabitan hukuman homisid salah tidak terjumlah pada membunuh diketepikan dan diganti dengan sabitan membunuh bawah s. 302 KK. Responden dijatuhkan hukuman mati.

Case(s) referred to:
Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA ***(refd)***
Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC ***(refd)***
Mancini v. Director of Public Prosecutions [1942] AC 1 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 8
Penal Code, ss. 299, 300, 302, 304(a)

For the appellant - Nik Syahril Nik Ab Rahman; DPP
For the respondent - Hj Azrul Zulkifli Stork & Fahmi Sulaiman; M/s Azharudin & Assocs

[Editor's note: Appeal from High Court, Melaka; Criminal Trial No: 45B-03-05-2014 (overruled).]

Reported by Najib Tamby

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] The respondent faced a charge of murder under s. 302 of the Penal Code. The charge read as follows:

> Bahawa kamu pada 31.7.2013 jam lebih kurang 2.30 petang sehingga jam lebih kurang 10.00 malam, di hadapan Stesen Janakuasa Power Tek Telok Gong, Kuala Sungai Baru, di dalam daerah Alor Gajah, di dalam Negeri Melaka, telah melakukan kesalahan bunuh dengan menyebabkan kematian terhadap seorang lelaki bernama Oh Son Liong (No. K/P: 581225-04-5057). Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The respondent claimed trial. At the end of the case of the prosecution, the learned Judicial Commissioner ("Judge") in the High Court amended the charge to one of culpable homicide not amounting to murder under s. 304(a) of the Penal Code. The respondent pleaded guilty to this amended charge. He was sentenced to 25 years imprisonment with effect from date of arrest.

[3] After an appeal by the prosecution, this court allowed the appeal and ordered the respondent to enter his defence on the original charge of murder. Back in the High Court, and after hearing the case for the defence, the learned judge again found the respondent guilty of the offence of culpable homicide not amounting to murder under s. 304(a) of the Penal Code. He was again convicted and sentenced to 25 years imprisonment from the date of arrest. The order by the High Court was made on 8 September 2017.

[4] The Public Prosecutor then filed this appeal. The appeal was heard on 4 March 2019. At the conclusion of the submissions, we unanimously allowed the appeal. We set aside the conviction and sentence under s. 304(a) of the Penal Code and substituted it with a conviction of murder under s. 302 of the Penal Code. The respondent was sentenced to death. Our reasons for doing so now follow. This will form the judgment of the court.

The Background

[5] Since there was no appeal by the respondent, the only issue in this appeal was whether the respondent ought to have been convicted for murder and not, as the learned judge found, guilty only of culpable homicide not amounting to murder under s. 304(a) of the Penal Code.

[6] The salient facts leading to the conviction of the respondent can be gathered from the version of the events given by the respondent at trial. On 31 July 2013, the respondent was in the house of SP19, Suhana binti Yaakob and SP23, Mohd Hafiz bin Yaakob. The respondent and SP23 were taking illicit drugs at the time. Whilst in the house, SP22, Rohani binti Kassim, who was the wife of the respondent, told the respondent that the "uncle TV" (a reference to the deceased Oh Son Liong) was asking for the instalment payments for the television and the refrigerator. On the same day, the respondent had also received a call from the deceased who told him to meet him (the deceased) at the vicinity of the power generation factory known as Powertech.

[7] When the respondent arrived at the Powertech factory, a quarrel took place between him and the deceased. According to the respondent, the deceased had uttered insulting words to him. He claimed that the deceased said that it was "susah berurusan dengan orang Melayu dan juga Melayu bangsat". The respondent said he became very angry and could not control himself. He then said that he was "dalam keadaan tidak sedar apa berlaku, kemudian menyedari telah menikam "uncle tv" dengan pisau yang berada di dalam bakul motosikal". In a state of panic, the respondent then ran away from the scene, but not before taking some valuables of the deceased.

[8] At the end of the prosecution's case, the learned judge amended the charge to one of culpable homicide under s. 304(a) of the Penal Code. The learned judge was of the view that the killing of the deceased was a spontaneous act by the respondent without any pre-planning. The learned judge was also of the view that there was a doubt as to the mental state of the respondent as the respondent was under the influence of heroin, an illicit drug which caused the respondent to lose focus.

[9] The learned judge also considered that the inflammatory words used by the deceased caused the respondent to lose his mind. Coupled with the fact that he was under the influence of drugs at the time, the learned judge held that the respondent was unable to control himself from stabbing the deceased. For these reasons, the charge was amended to one of culpable homicide under s. 304(a) of the Penal Code.

[10] On appeal to this court, the appeal was allowed. The respondent was ordered to enter his defence on the original charge of murder. Although no written grounds of decision were available, it was obvious that this court was not impressed with the reasons given by the trial judge to reduce the charge to one of culpable homicide. After the defence had completed their case, the

learned judge again found the respondent guilty under the reduced charge of culpable homicide and sentenced the respondent to the same punishment of 25 years imprisonment.

[11] In coming to his decision, the learned judge provided the same justification for his decision as follows (para. 13 of grounds of judgment):

> Pertama sekali adalah OKT tidak pergi mencari simati. Kedua, keterangan pihak pendakwaan sendiri menunjukkan bahawa pada setiap masa, pisau yang dikatakan yang digunakan untuk menikam simati berada dalam bakul motosikal OKT. Ketiga, keterangan saksi pendakwaan sendiri menunjukkan bahawa OKT merupakan seorang penagih dadah yang tegar. Tiga fakta ini mempengaruhi keputusan saya pada hari ini. Saya mendapati berdasarkan keterangan yang ada, wujud fakta-fakta yang menunjukkan bahawa kejadian berlaku tanpa dirancang. Dengan kata lain kejadian OKT menikam simati berlaku "at the spour *(sic)* of the moment", dalam mana keadaan situasi tegang. Apa yang lebih penting lagi pada saya pada ketika ini adalah apabila OKT disoal samada beliau tahu simati mati atau tidak, beliau kata beliau tidak tahu, tahu-tahu dah ditikam. Fakta-fakta ini menjuruskan bahawa keterangan yang ada tidak cukup untuk membuktikan bahawa OKT telah melakukan kesalahan bunuh sepertimana yang ditakrifkan di bawah Seksyen 302 Kanun Keseksaan.

[12] The learned judge also appeared to accept the defence of grave and sudden provocation for the same reasons given at the end of the prosecution's case. For good measure, the learned judge also stated that he was impressed ('kagum") with the way the respondent answered questions during cross-examination. His calm demeanour in doing so and without hesitation was a strong factor as to why the learned judge accepted the respondent's testimony.

The Instant Appeal

[13] Before us, although several grounds were listed in the petition of appeal, the learned Deputy Public Prosecutor ("DPP") attacked the findings of the learned trial judge on two main planks. The first was that the evidence relating to the intention to kill was not sufficiently considered by the learned judge. The learned judge did not take into account the nature and severity of the injuries to vital organs of the deceased. The second was that the conduct of the respondent prior to and after the incident, which negated any defence of grave and sudden provocation and lack of intention, was not considered by the learned judge.

Whether Murder Or Culpable Homicide Not Amounting To Murder

[14] In our view, the crux of the learned DPP's submission concerns the question of whether, after considering all the circumstances in this case, it had been sufficiently established that there was the necessary intention to cause death as required by law, specifically s. 300 of the Penal Code. Section 300 of the Penal Code reads as follows:

300. Except in the cases hereinafter excepted, culpable homicide is murder: A

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused; B

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid. C

[15] Now, as alluded to earlier, the learned judge had on two occasions ruled that the evidence established only a charge for culpable homicide and not murder. The reasons for coming to this conclusion were also set out earlier. The learned DPP had urged upon us that the conviction should be for the offence of murder under s. 302 of the Penal Code as the learned judge had failed to sufficiently consider the overwhelming evidence establishing the necessary intention under s. 300 of the Penal Code. D E

[16] In this context, we agreed that the learned judge was in error in failing to consider various compelling evidence adduced by the prosecution. Firstly, there was the evidence of the post-mortem report on the deceased (exh. P60 at pp. 187-192 of appeal record vol 3) and the court testimony of the pathologist SP14. That post-mortem report concluded as follows: F

> Postmortem examination revealed multiple stabbed wounds on the body which had penetrated internally to cause injuries namely to the rib cage, pericardium and heart, diaphragm, stomach, liver and small intestines which had led to his death. These stabbed wounds to the body were consistent with infliction by a sharp, penetrating object and was of homicidal in manner. ... G
>
> In my opinion, the cause of death is attributable to the multiple stabbed wounds to the body as sustained by the deceased.

[17] It is a fundamental principle in criminal law that the burden of proving any criminal charge is on the prosecution throughout the case and never shifts to an accused person. If the prosecution fails to discharge this burden, the case made out may be one of culpable homicide not amounting to murder as depicted in s. 299 of the Penal Code. So the question before us, and indeed the trial Judge, was whether the elements of the charge of murder under s. 300 of the Penal Code had been established beyond reasonable doubt. H I

[18] In the instant case, taking into account the multiple stab wounds inflicted on vital organs in the body, there can be little doubt that there was at least the intention to cause such bodily injury which was sufficient in the ordinary course of nature to cause death. In fact, the bodily injury caused was such that the respondent knew would cause the death of the deceased. So, intention under elements (b) and (c) of s. 300 of the Penal Code was proved.

[19] Secondly, the conduct of the respondent on the day of the incident bears out his intention to inflict those injuries. He had brought a knife with him on the day of the incident. There was some discrepancy as to whether the said knife was always in the motorcycle or whether he had specifically taken the knife from his house on that fateful day. Giving the respondent the benefit of any doubt, there was no reason for him to have the knife in his hand when the argument took place between him and the deceased.

[20] What is also compelling is that after having stabbed the deceased multiple times, the respondent had also taken the valuables of the deceased. He had admitted in his evidence to taking the wallet, gold chain and a Sony Ericson mobile phone from the deceased after he had killed him. This gold chain was subsequently given to SP19 who then pawned it for money. The respondent also admitted that after taking the wallet from the deceased, he had thrown away the identity card and driving licence and kept the money in it. This was all conduct relevant under s. 8 of the Evidence Act 1950 to establish motive and preparation for the crime. With respect, there was clearly insufficient consideration of all these matters by the learned judge.

[21] Now, the learned judge appeared to place much emphasis on the defence of grave and sudden provocation as provided by Exception 1 to s. 300 of the Penal Code. The evidence was that the respondent was gravely provoked by the words used by the deceased "susah berurusan dengan orang Melayu" and "Melayu bangsat". The words "Melayu bangsat" did not appear in the police statement of the respondent (D83) and were only revealed by him in his evidence. Even giving the respondent the benefit of the doubt, there was no reason for the respondent to lose his self-control as the deceased was only trying to recover the debt that was owed to him. The deceased was also unarmed on that fateful day.

[22] The law on what amounts to grave and sudden provocation is well-settled. In *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162, the Supreme Court through the judgment of George Seah SCJ observed (at p. 165):

> The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control
>
> (see *Nanavati v. State of Maharashtra* [1962] AIR SC 602).

[23] In order to set up provocation as a defence to reduce the offence of murder to one of culpable homicide, it is necessary to show such grave and sudden provocation as would cause any reasonable person to lose his or her self-control as provided by Exception 1 to s. 300 of the Penal Code. In this way, a mere statement by an accused that he lost his self-control is insufficient. The test of gravity is an objective one. So the test is: would such provocation cause a reasonable man to lose his self-control. By this test, an "unusually excitable or pugnacious individual" is excluded (see *Mancini v. Director of Public Prosecutions* [1942] AC 1). So would a person who is unusually sensitive or is hot tempered. The law must be applied evenly as otherwise persons who are hot tempered or have a thin skin would always escape the heavier punishment.

[24] Nevertheless, what is grave to the point of causing loss of self-control is a question of fact which depends on the facts and circumstances of each case. Even so, the type and manner of retaliation must not be disproportionate to the provocation. So, for example, bringing a knife and stabbing someone multiple times after a mere verbal spat would be thoroughly disproportionate.

[25] Reverting to the instant appeal, it appeared to us that the action of the respondent was certainly out of proportion to the gravity of the provocation. The nature of the provocation was at most mere verbal abuse for a debt due. Such provocation would not be met by any reasonable person with multiple stab wounds to vital organs of the body. In our considered view, the actions of the respondent must fail the "grave and sudden" requirement of provocation. The response of the respondent to mere verbal abuse, and that too by an unarmed man, informed us that he was a callous man with a total disregard of human life.

[26] In our respectful view, the learned judge was in error in holding that grave and sudden provocation had been established. The learned judge may have been persuaded by the possibility that the respondent's decision making ability was impaired as he was under the influence of drugs at the material time. However, as we had earlier reiterated, the law must be applied evenly. In any case, what is noteworthy is that the respondent had the presence of mind to scoot away with the belongings of the deceased after killing him. He was also able to decide to throw away the identification card and driving licence of the deceased. In our view, the respondent was not under any impairment of his thinking ability. His response that he panicked rang hollow after he made the conscious decision of taking the valuables of the person he had just killed.

[27] Now, the learned judge also noted the impressive manner in which the respondent gave evidence in court and especially the way in which he answered questions without hesitation during cross-examination. In short, the demeanour of the respondent in the witness box suggested to the learned judge that he was a truthful witness.

[28] In this regard, we must hasten to observe that demeanour in the courtroom is not always a reliable guide to credibility. A consummate liar may be completely calm and unruffled by any stress during cross-examination. And there is usually some delay between arrest and trial. Hence there is plenty of time to prepare and rehearse answers to possible questions.

[29] On the other hand, an honest but anxious witness terrified of being disbelieved would be nervous when giving answers in the courtroom thus projecting a shaky demeanour. To add to the adversity, advocates are often quick to take advantage of such a witness to manipulate demeanour and destroy the credibility of an otherwise truthful witness. This is not helped by the sometimes tense atmosphere in the courtroom which can also by itself engender anxiety in any witness and more so one with poor education or limited intelligence. The unfortunate result is that such a witness may be wrongly perceived by the judge to be untruthful.

[30] So, a judge in a courtroom is in no position to place complete faith in demeanour as a guide to honesty. It would be far better to determine the truthfulness of a witness by a critical examination of his testimony with the whole of the evidence adduced at the trial. His testimony may be consistent or inconsistent with the established facts and circumstances or may be corroborated by other evidence at the trial. Certainly demeanour should be the least weighty element in determining credibility (see *Lee Kwai Heong & Anor v. PP* [2006] 1 CLJ 1043).

[31] In the instant case, we did not think that the demeanour of the respondent as noted by the learned judge was sufficient to override the overwhelming and uncontroverted evidence against the respondent. As alluded to earlier, the respondent had committed a vile and reprehensible act with the requisite intention to cause death.

Conclusion

[32] In the circumstances, and for the reasons we have given, we were of the view that there were merits in the appeal. The decision of the High Court was against the weight of evidence. Having scrutinised the whole of the evidence, and for the reasons provided, a conviction for murder under s. 302 of the Penal Code was warranted. Accordingly, we set aside the conviction and sentence for culpable homicide not amounting to murder and substituted it with a conviction for murder under s. 302 of the Penal Code. As a necessary consequence, the respondent was sentenced to death as required by law.